NO. 48745-4-II

COURT OF APPEALS, DIVISION II

OF THE STATE OF WASHINGTON

JOHN C. HAWTHORNE,

Appellant

v.

KRISTINA POMERLEAU,

Respondent.

APPELLANT'S AMENDED BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Court Rules

Other Authority

INTRODUCTION

This is an unlawful detainer action. The tenancy was residential. Appellant is the landlord. Respondent is the tenant. Thurston County Superior Court Commissioner Rebekah Zinn heard two ex parte motions brought by the tenant seeking stays of writs of restitution and granted the requested stays.[1] Under RCW 59.18.390(1), when a stay is granted the tenant must post a bond. Each time the court stayed a writ it waived the bond. There are two overarching issues: First, does a court have authority to hear ex parte motions to stay writs of restitution. Second, does a court have authority to waive the bond.

ASSIGNMENTS OF ERROR

1. The court erred when it heard ex parte motions to stay the writs and granted stays.

2. The court erred when it waived the bonds required by RCW 59.18.390(1).

1

A ruling by a superior court commissioner is appealable as a final judgment. It is not necessary to seek review of the commissioner's ruling by a superior court judge before appealing to the Court of Appeals. RCW 2.24.050; Tegland, 2A Washington Practice Rules Practice Eighth ed. (2014) page 100; *Guardianship of Bellanich*, 43 Wn. App. 345, 348 - 349, 717 P.2d 307 (1986) rejected on other grounds by *Brouillet v. Cowles Pub. Co.*, 114 Wn.2d 788, 791 P.2d 526 (1990).

ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Although the case is moot, is the test for hearing moot issues met? (Assignments of error 1 and 2).

2. Were the tenant's motions, supporting documents and argument in support of the motions ex parte communication prohibited by Canon 2.9(A) of the Code of Judicial Conduct? (Assignment of error 1).

3. Were the tenant's motions properly before the court under CR5(a) and CR6(d)? (Assignment of error 1).

4. Were the stays void *ab initio* under the common law? (Assignment of error 1).

5. Were the hearings and the stays *ultra vires* under RCW 59.18.390(1)? (Assignments of error 1 and 2).

6. Did the hearings violate Canon 2.6(A) of the Code of Judicial Conduct? (Assignment of error 1).

7. Was the landlord denied procedural due process? (Assignment of error 1).

8. Is the landlord entitled to attorney fees on appeal? (Assignments of error 1 and 2).

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STATEMENT OF THE CASE

On January 14, 2016, while incarcerated in the City of Olympia jail, the tenant was served with an amended summons and a complaint (CP 34, CP 40 - 47 and CP 100 Finding of Fact 1). The tenant was then ordered to appear January 29 and show cause why a judgment should not be entered and a writ should not issue (CP 101 Finding of Fact 2). The tenant did not respond to the amended summons, answer the complaint or appear at the hearing (CP 101 Finding of Fact 3). A judgment on show cause restored possession of the premises to the landlord "forthwith" and granted a writ of restitution (CP 21 lines 3 - 5). The writ was posted by the sheriff February 1 (CP 62).

On February 4 the tenant brought an ex parte motion to stay the writ, claiming that she was served only with a 3 day notice to pay rent or vacate and a writ of restitution (CP 24 - 25 and CP 101 Findings of Fact 4 and 5).[2] The tenant's claim was false and she knew it was false (CP 101 Finding of Fact No. 5). Landlord's counsel had no notice of the hearing (CP 33). As

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2 There is no verbatim report of the February 4 and March 10 *ex parte* hearings (Declaration Regarding Verbatim Report Of Proceedings). A court reporter is not present during the ex parte calendar (*Id.*). Landlord's counsel requested a recording of the February 4 hearing, but was informed that the ex parte calendar is not recorded (*Id.*).

a result of the tenant's knowingly false claim, the court stayed the writ on the basis that "there is a dispute about service of process" (CP 25 and CP 101 Finding of Fact 6).

Under RCW 59.18.390(1), a tenant who obtains a stay must post a bond set by the court that is sufficient to pay all sums awarded to the landlord for use and occupation of the premises, rent, damages and costs of the action. Recently, when staying a writ, the court has used a pre-printed form order which states "Bond is waived until the hearing on the merits of this motion" (CP 25 and CP 58). The court waived the bond and set a February 12 show cause hearing (CP 25). Prior to that hearing, the landlord objected to the stay in writing on the basis that it was granted contrary to RCW 59.18.390(1) and based upon prohibited ex parte communication (CP 29 line 6 - CP 31 line 12).

During the show cause hearing the tenant testified under oath that she was not served with any documents January 14 while she was jailed (CP 82 lines 1 - 24 and CP 101 - 102 Finding of Fact 7). The tenant's testimony was false and she knew it was false (*Id.*). As a result of the tenant's knowingly false testimony, the court ordered the landlord to re-serve her with a summons and complaint:

> THE COURT: I'm going to find that there is a question of fact on this.
> Moreover, I don't want to send this to any sort of evidentiary hearing to resolve this; this is a show-cause hearing, not an evidentiary hearing, to resolve whether Ms. Pomerleau was served or not. There is enough here to get it to an evidentiary hearing. However, that would put you, Mr. Gusa in a very difficult position of being a witness in your own case.
>
> MR. GUSA: No, it would not, Your Honor.
>
> THE COURT: Okay. So –
>
> MR. GUSA: I can call alternative counsel. I need to have this done as quickly as humanly possible.
>
> THE COURT: I am going to have you re-serve her. Thank you. That is my ruling: I am going to have you re-serve her with the Summons and Complaint. And that is where we are at. So that's – I am going to enter a ruling requiring re-service –

(CP 38, CP 85 lines 6 - 25 and CP 102 Finding of Fact 8).

Moments later, the tenant was served with a second amended summons and a complaint and acknowledged being served (CP 86 lines 1 - 18 and CP 103 Findings of Fact 9 and 10). The tenant was subsequently ordered to appear March 4 and show cause why a judgment should not be entered and a writ should not be issued (CP 103 - 104 Finding of Fact 11).

Prior to the show cause hearing, a second declaration of service of the amended summons and the complaint on January 14 was filed (CP 40 - 47).

Included in the declaration were six security camera photographs from the City of Olympia which show the tenant being served in the jail (CP 42 - 47). The tenant did not respond to the second amended summons, answer the complaint or appear at the March 4 hearing (CP 103 - 104 Finding of Fact 11). The court found that:

> On January 14 the defendants were properly served with amended summons, complaint and amended notice under RCW 59.18.375. On February 12, the defendants were properly served with second amended summons, complaint and second amended notice under RCW 59.18.375.

(CP 49 Finding of Fact 4).

A second writ was granted (CP 50 lines 5 - 7 and CP 103 - 104 Finding of Fact 11). The writ was posted by the sheriff March 7 (CP 62).

On March 10 the tenant once again sought a stay ex parte (CP 54 - 58 and CP 104 Finding of Fact 12). The court granted the stay on the basis that "there is a question about whether the Summons Return date was correct and whether an answer was filed before the New Return date" (CP 58 lines 16 - 18). The court again waived the bond required by RCW 59.18.390(1) (*Id.* line 25). At a show cause hearing the next day, the court found that the second amended summons was legally sufficient and without defect (CP 60 Finding of Fact 3). The court lifted the stay and the writ was executed March

15 (CP 60 line 14 and CP 62).

The tenant was ordered to appear April1 and show cause why she should not be held in contempt of court (CP 100 lines 8 - 11). The court held that in the course of the litigation the tenant violated CR 11, engaged in contempt of court and "may have" committed perjury (CP 104 lines 15 - 19). Subsequent to the initial judgment entered January 29, the court granted the landlord four supplemental judgments for rent, costs and attorney fees in the total sum of $9,916 (CP 48 - 53, CP 59 - 61 and CP 98 - 99).

ARGUMENT

1. ALTHOUGH THE CASE IS MOOT, THE TEST FOR HEARING MOOT ISSUES IS MET AND THE COURT SHOULD HEAR THE CASE

This case is moot. It became moot when the sheriff executed the writ March 15. However, the case raises important issues involving interpretation and application of the Code of Judicial Conduct, the civil rules, the Residential Landlord-Tenant Act, and the due process clauses of both the Washington and United States constitutions.

Appellate courts have "discretion to review cases that are technically moot but involve "issues of continuing and substantial public interest." *In re Detention of M.W.*, Slip Op. 90570-3 June 9, 2016 (citing *State v. Beaver*,

184 Wn.2d 321, 330, 358 P.3d 385 (2015)). When considering whether a case involves "issues of continuing and substantial public interest" a court looks at three factors:

> (1) the public or private nature of the question presented, (2) the desirability of an authoritative determination for the future guidance of public officers, and (3) the likelihood of future recurrence of the question.

Id. (citing *State v. Hunley*, 175 Wn.2d 901, 907, 287 P.3d 584 (2012)).

Most of the moot cases considered by appellate courts involve constitutional or statutory interpretation. *In re Mines*, 146 Wn.2d 279, 285, 45 P.3d 535 (2002). Such issues tend to be more public in nature, are more likely to arise again, and the decisions help guide public officials. *Id.* The gravamen of the appeal involves interpretation of constitutional provisions, court rules and RCW 59.18.390(1). These are public issues. Authoritative determination will provide important guidance to judicial officers.

These issues occur each time a stay of a writ of restitution is sought ex parte in Thurston county. They will undoubtedly recur in the future. Because this case was fully adjudicated by the trial court, there is a more complete record than may exist in a future case considered on discretionary review.

Counsel has found no case authority that directly addresses whether

under the Code of Judicial Conduct, the civil rules, the common law, the Residential Landlord-Tenant Act and the due process clauses of the Washington and United States constitutions, a court has authority to hear an *ex parte* motion to stay a writ. Whether the court has authority to waive the bond required by RCW 59.18.390(1) is an issue of first impression. The test for hearing a moot case is met. Review is well warranted.

2. THE STANDARD OF REVIEW IS DE NOVO

A court reviews "both the interpretation and the application of court rules de novo." *In re Dependency of M.H.P.*, 184 Wn.2d 741, 753, 364 P.3d 94 (2015)(citing *State v. McEnroe*, 174 Wn.2d 795, 800, 279 P.3d 861 (2012)). The meaning of a statute is a question of law that is reviewed de novo. *Jongeward v. BNSF R. Co.*, 174 Wn.2d 586, 592, 278 P.3d 157 (2012)(citing *State v. Breazeale*, 144 Wn.2d 829, 837, 31 P.3d 1155 (2001)). A court reviews a claim of denial of a constitutional right de novo. *State* v. *Drum,* 168 Wn.2d 23, 31, 225 P.3d 237 (2010)(citing *Brown v. State,* 155 Wn.2d 254, 261, 119 P3d 341 (2005). Review is de novo.

3. THE PRINCIPLES FOR INTERPRETATION OF STATUTES AND COURT RULES

When interpreting a statute, the court's "fundamental objective is to ascertain and carry out the Legislature's intent." *Kovacs v. Department of*

Labor & Industries, Slip Op. 92122-9 July 14, 2016)(citing *Department of Ecology v. Campbell & Gwinn, LLC,* 146 Wn.2d 1, 9, 43 P.3d 4 (2002)). If language in a statute has only one meaning, the inquiry ends there. *State v. Kintz*, 169 Wn.2d 537, 548, 238 P.3d 470 (2010)(citing *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007).

If the language of a statute "is unambiguous, a reviewing court is to rely solely on the statutory language." *State v. Roggenkamp*, 153 Wn.2d 614, 621, 106 P.3d 196 (2005). The Roggenkamp court discussed the rules of statutory interpretation at length:

> [E]ach word of a statute is to be accorded meaning.' *State ex rel. Schillberg v. Barnett*, 79 Wash,.2d 578, 584, 488 P.2d 255 (1971). "'[T]he drafters of legislation ... are presumed to have used no superfluous words and we must accord meaning, if possible, to every word in a statute.'" *In re Recall of Pearsall-Stipek*, 141 Wash.2d 756, 767, 10 P.3d 1034 (2000) (quoting *Greenwood v. Dep't of Motor Vehicles,* 13 Wash. App. 624, 628, 536 P.2d 644 (1975)). "[W]e may not delete language from an unambiguous statute." "Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous." *State v. J.P.,* 149 Wash.2d 444, 450, 69 P.3d 318 (2003)(quoting *Davis v. Dep't of Licensing,* 137 Wash. 2d 957, 963, 977 P.2d 554 (1999)(quoting *Whatcom County v. City of Bellingham,* 128 Wash. 2d 537, 546, 909 P.2d 1303 (1996)).

Court rules are interpreted using the same principles. *Jafar v. Webb*, 177 Wn.2d 520, 527, 303 P.3d 1042 (2013).

4. THE FINDINGS OF FACT THAT WERE UNCHALLENGED ARE VERITIES ON APPEAL

Unchallenged findings of fact are verities on appeal. *In re Estate of Barnes*, 185 Wn.2d 1, 9, 367 P.3d 580 (2016)(citing *In re Estate of Haviland*, 162 Wn. App. 548, 563, 255 P.3d 854 (2011)). The findings of fact that were not challenged, including all of the findings entered during the April 1 contempt hearing that the defendant did not attend are verities on appeal (CP 100 line 9).

5. THE COURT CONSIDERED EX PARTE COMMUNICATION PROHIBITED BY CANON 2.9(A) OF THE CODE OF JUDICIAL CONDUCT

The tenant's motions, supporting documents and argument in support of the motions were ex parte communication prohibited by Canon 2.9(A) of the Code of Judicial Conduct. Ex parte communication is communication made by or to a judicial officer during a proceeding without prior notice to a party. *State v. Watson*, 155 Wn.2d 574, 579, 122 P.3d 903 (2005)(citing *State v. Bourgeois,* 133 Wn.2d 389, 407 - 408, 945 P.2d 1120 (1997). Canon 2.9(A) of the Code of Judicial Conduct governs ex parte communication:

> A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter before that judge's court except as follows:

> (1) When circumstances require it, ex parte communication for scheduling, administrative, or emergency purposes, which does not address substantive matters, or ex parte communication pursuant to a written policy or rule for a mental health court, drug court, or other therapeutic court, is permitted, provided:
>
> (a) the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication ...

State v. Davis, 175 Wn.2d 287, 290 P.3d 43 (2012) addresses ex parte communication. The trial court "on his own and without consulting the parties," decided to change a trial date. *Id.* at 304. Later, the judge asked two deputy prosecuting attorneys to prepare a revised scheduling order, "approve it, and then give defense counsel a copy for signature." *Id.* Former Canon 3(A)4 (1995) prohibited "judges from engaging in ex parte contact". *Id.* at 305. The defendant moved to have the judge recuse himself due to this ex parte contact. *Id.* The motion was denied. *Id.* On appeal Davis argued that the court abused its discretion by failing to recuse. *Id.*

The state conceded that ex parte contact occurred when the judge asked deputy prosecutors to approve the scheduling order and deliver it to defense counsel for signature, but denied that the contact necessitated recusal. *Id.* There was no showing of bias on the part of the judge or prejudice to the defendant. *Id.* at 307. Absent such a showing, the Supreme

Court held that the judge's decision not to recuse was not reversible error. *Id.*

Here, because landlord's counsel had no notice of the motions or the hearings, the motions, the supporting documents and the tenant's argument in support of the motions were ex parte communication that was prohibited by Canon 2.9(A) unless an exception in the Canon applied. None of the exceptions apply.

Subsection (1) of the Canon provides that "ex parte communication for scheduling, administrative, or emergency purposes, which does not address substantive matters" is permitted "when the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication." Setting the show cause hearings was allowed scheduling (CP 25 and CP 58). Granting the stays was not scheduling or an administrative purpose.

In seeking the stays the tenant undoubtedly described each situation as an emergency. However, the tenant's litigation strategy of failing to respond to summonses, failing to answer the complaint, failing to appear at show cause hearings, waiting until writs were posted, then seeking stays resulted in situations of the tenant's own making that were not *bona fide*

emergencies and not a basis for the stays. Even if emergencies did exist, ex parte communication for "emergency purposes" is allowed only if it does "not address substantive matters". The motions for stays were certainly substantive.

Moreover, under subsection (1)(a) of the Canon, ex parte communication for scheduling, administrative, or emergency purposes is allowed only if the judicial officer "reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication." The stays were themselves an advantage. They allowed the tenant to continue residing in the apartment and allowed her to do so without payment of rent.

The court could not reasonably have believed that the tenant would not gain a procedural, substantive or tactical advantage. The exception to Canon 2.9(A) that allows ex parte communication for scheduling, administrative, or emergency purposes did not apply. The court permitted and considered communication prohibited by Canon 2.9(A).

6. UNDER CR5(a) AND CR6(d) THE MOTIONS WERE NOT PROPERLY BEFORE THE COURT

The motions were heard ex parte contrary to CR5(a) and CR6(d). CR5(a) requires that "every written motion other than one which may be

heard ex parte ... shall be served upon each of the parties." As discussed in § 5 above, the tenant's motions for stays were prohibited ex parte communication. Consequently, CR5(a) required that the motions be served on landlord's counsel. CR6(d) specifies the time period for service of motions and notice of hearings:

> A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than 5 days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application.

CR6(d) is discussed in *Marriage of Mahalingham*:

> The Rules of Civil Procedure ... provide that the moving party should give at least 5 days' notice of a hearing on a motion to the nonmoving party. CR 6(d). Although the time limit is not jurisdictional (Loveless v. Yantis, 82 Wash.2d 754, 513 P.2d 1023 (1973)), **notice to the respondent may not be dispensed with**.

21 Wn. App. 228, 230, 584 P.2d 971(1978)(rehearing denied, emphasis supplied). The motions were brought in violation of CR5(a) and CR6(d), and were not properly before the court. The proper course of action for the court was to grant orders shortening time, set hearings on shortened time and require service on landlord's counsel.

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7. THE STAYS WERE VOID AB INITIO UNDER THE COMMON LAW

Under the common law, the stays were void *ab initio*. An order "based on a hearing in which there was not adequate notice or opportunity to be heard is void." *Esmieu v. Schrag,* 88 Wn.2d 490, 497, 563 P.2d (1977), *Morley v. Morley,* 131 Wash. 540, 543 - 545, 230 P. 645 (1924). Because the landlord had no notice of the hearings and no opportunity to be heard regarding the tenant's motions for stay, the stays were void *ab initio.*

8. THE STAYS WERE ULTRA VIRES UNDER THE RESIDENTIAL LANDLORD-TENANT ACT

A. The Stays Were Ultra Vires Because The Court Waived Required Bonds

Under the Residential Landlord-Tenant Act, RCW 59.18.390(1), a tenant who wishes to stay a writ and continue to occupy the premises while the litigation is pending must post a bond. *Housing Authority v Pleasant*, 126 Wn. App. 382, 390, 109 P.3d 422 (2005)(citing RCW 59.18.390)), Stoebuck and Weaver, 17 *Washington Practice Real Estate: Property Law* Second ed. § 6.81 page 450 (2004). RCW 59.18.390(1) provides that:

> The sheriff shall, upon receiving the writ of restitution, forthwith serve a copy thereof upon the defendant, his or her agent, or attorney, or a person in possession of the premises, and shall not execute the same for three days thereafter, and **the defendant, or person in possession of the premises**

> **within three days after the service of the writ of restitution may execute to the plaintiff a bond to be filed with and approved by the clerk of the court in such sum as may be fixed by the judge, with sufficient surety to be approved by the clerk of the court, conditioned that they will pay to the plaintiff such sum as the plaintiff may recover for the use and occupation of the premises, or any rent found due, together with all damages the plaintiff may sustain by reason of the defendant occupying or keeping possession of the premises, together with all damages which the court theretofore has awarded to the plaintiff as provided in this chapter, and also all costs of the action**

(emphasis supplied).

The purpose of the bond "is to secure the landlord against losses during the pendency of the proceedings when the tenant continues to occupy the premises." *Pleasant*, 126 Wn. App. at 390. RCW 59.18.390(1) is clear on its face and is susceptible to only one reasonable interpretation. A bond is required whenever a court stays a writ. A court has no authority to waive the bond.

Contrary to RCW 59.18.390(1), the court waived the bonds (CP 25 and CP 58). The court used a pre-printed form order which states "Bond is waived until the hearing on the merits of this motion" (*Id.* line 25). This denied the landlord the protection of the bonds required by RCW 59.18.390(1). Subsequent to the first stay, the court entered four

supplemental judgments for damages, attorney fees and costs of suit in the total sum of $9,916.[3] There is no assurance whatever that the supplemental judgments can be collected. The landlord suffered the very fate that the bond requirement was enacted to prevent, losses that result from the stays without an asset readily available to satisfy the supplemental judgments granted.

B. The Stays Were Ultra Vires Because The Landlord Did Not Have Statutorily Required Notice Of The Hearings And Opportunity To Be Heard Regarding The Bond

Separate and distinct from CR5(a) and CR6(d), RCW 59.18.390(1) requires that the landlord have notice of the hearing and an opportunity to be heard regarding the bond:

> The plaintiff, his or her agent or attorneys, shall have notice of the time and place where the court or judge thereof shall fix the amount of the defendant's bond, and shall have notice and a reasonable opportunity to examine into the qualification and sufficiency of the sureties upon the bond before the bond shall be approved by the clerk.

Because the court acted on the tenant's motions ex parte, the landlord did not receive statutorily required notice of the hearing and had no opportunity to be heard regarding the bond (CP 25, CP 33 and CP 58). By hearing the motions ex parte and waiving the bonds, the court acted contrary to the plain meaning of RCW 59.18.390(1). The court failed to accord

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[3] The court also awarded a sanction of $1,000 (CP 99).

meaning to each word in the statute. To the contrary, the court rendered much of the statute both meaningless and superfluous. The stays were *ultra vires* under RCW 59.18.390(1).

9. CONTRARY TO CANON 2.6(A) OF THE CODE OF JUDICIAL CONDUCT, THE COURT DENIED THE LANDLORD THE RIGHT TO BE HEARD ACCORDING TO LAW

Canon 2.6(A) of the Code of Judicial Conduct states that "A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law." As discussed in § 6 above, the court denied landlord the right to be heard under CR5(a). As discussed in § 7 above, the court denied the landlord the right to be heard under the common law. As discussed in § 8(B) above, the court denied the landlord the right to be heard under RCW 59.18.390(1). In this manner the court violated Canon 2.6(A).

10. THE LANDLORD WAS DENIED PROCEDURAL DUE PROCESS

Article I, section 3 of the Washington Constitution guarantees that "[n]o person shall be deprived of life, liberty, or property, without due process of law." The United States Constitution guarantees that state government will not deprive an individual of life, liberty, or property without

due process of law. *State v. Shelton*, Slip. Op 72848-2-1 June 20, 2016. The procedural elements of the constitutional guarantee of Article 1 § 3 of the Washington State Constitution are "notice and the opportunity to be heard and defend." *Esmieu v. Schrag*, 15 Wn. App. 260, 265, 548 P.2d 581 (1976)(*Affd.* 88 Wn.2d at 490 (1977).

Notice and an opportunity to be heard on matters that "materially affect a litigant's rights are essential elements of due process that may not be disregarded." *Marriage of Mahalingham*, 21 Wn. App. at 230. Orders entered in a proceeding that fails to afford procedural due process are void. *Marriage of Ebbighausen*, 42 Wn. App. 99, 102, 708 P.2d 1220 (1985). Because the landlord did not have notice of the hearings and opportunities to be heard, the hearings did not comply with the requirements of procedural due process of Article I § 3 of the Washington constitution and the Fourteenth Amendment of the United States Constitution.

11. THE LANDLORD WAS SUBSTANTIALLY PREJUDICED

A party is prejudiced by a lack of actual notice and opportunity to provide countervailing oral argument and submit authority. *Zimny v. Lovric*, 59 Wn. App. 737, 740, 801 P.2d 259 (1990)(citing *Goucher v. J.R. Simplot Co.*, 104 Wn.2d 662, 665, 709 P.2d 774 (1985)). Each time a stay was

granted the landlord had no opportunity to argue that there was no basis for a stay, and that if a stay was granted, a bond was required. In this manner, the landlord was substantially prejudiced.

12. THE LANDLORD IS ENTITLED TO ATTORNEY FEES AND COSTS ON APPEAL

When a rental agreement provides that the prevailing party is entitled to reasonable attorney fees and costs, that includes attorney fees and costs on appeal. *Western Plaza v. Tison*, 184 Wn.2d 702, 718, 364 P.3d 76 (2015). Under paragraph 12 of the rental agreement, the landlord is entitled to attorney fees (CP 13).

CONCLUSION

The Supreme Court recently observed that:

> The proper functioning of the adversary system depends on both parties having an opportunity to be heard when the court makes decisions related to a case. Failing to apprise all parties of pending motions can result in the court's making errors.

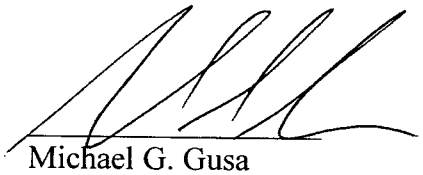
In re Dependency of M.H.P, 184 Wn.2d at 763. This case is an example of what can occur when a party is denied notice of hearings and opportunity to be heard.

If a court can waive notice and an opportunity to be heard before staying a writ, and can waive the bond required by RCW 59.18.390(1), what

right possessed by a landlord is beyond the power of a court to waive? The landlord respectfully requests the court enter a published opinion which holds that there is no lawful basis to hear ex parte motions to stay writs of restitution and no lawful basis to waive the bond required by RCW 59.18.390(1).

November 5, 2016

Respectfully submitted,



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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JOHN C. HAWTHORNE, Appellant,	]	No. 48745-4-II
vs.	]	DECLARATION OF SERVICE BY MAIL
KRISTINA POMERLEAU, Respondent.	]	

I am the attorney for the Appellant. On November 7, 2016 I deposited into the United States mail a properly stamped and addressed envelope containing copies of the Appellant's Amended brief directed to the Respondent, Kristina Pomerleau, General Delivery, Olympia, Washington 98501. A copy of a certificate of mailing is attached.

I DECLARE UNDER PENALTY OF PERJURY OF THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE AND BELIEF.

Dated: November 18, 2016 at Olympia, Washington

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